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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 138

Z. M. McCARROLL, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,

Appellant,

vs.

DIXIE GREYHOUND LINES, INC.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REBUTTAL BRIEF OF APPELLEE

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Statement

We ask leave to file this memorandum for the reason that appellant, in his reply brief, makes two points not heretofore considered. These are:

1. That Appellee's point No. 3 (Brief III, p. 29) was not raised in the lower court and cannot be relied upon here. This point is that the application of the tax to *all* gasoline

(over 20 gallons) brought into the State is contrary to the express terms of the statute itself; and

2. That this contention (Brief III, as above) is without merit because Act 67 of 1933 *levies* a new tax applicable to Appellee.

We, therefore, ask the court's permission to discuss these contentions briefly.

Summary of the Argument

I.

The question of the proper construction of the Arkansas statutes, Act 67 of 1933 and Act 11 of 1934 was raised in the trial court and Appellee's contentions again presented to that court in the petition to rehear.

This refers to pages 6 to 9 of Appellant's Reply Brief.

II.

The Arkansas Act 67 of 1933 does not levy any tax.

This refers to Appellant's reply brief pages 9 to 14.

ARGUMENT

I.

Neither counsel representing the Appellant in this court participated in the trials in the District Court or Circuit Court of Appeals. The court should therefore excuse, *but not be misled by*, the statement that the point was not raised in the District Court. Counsel probably did not have before them Appellee's trial court brief, part II of which fully presented this question to the District Court.

While the trial briefs are not before this Court, the pleadings and proceedings in the District Court and Assignments of Error and Brief in the Circuit Court of Appeals (which are before this Court) clearly show that the question of

proper interpretation or construction of the two Arkansas statutes quoted in the bill, was raised and relied upon.

Pleadings:

The bill sets out Chapter 67, Acts 1933 entitled "An Act to better enforce *the Gasoline Tax*" and then sets out the pertinent portions of Act 11 of 1934 which levies "the Gasoline Tax", and provides a tax of 6½ cents per gallon on gasoline bought in other States "for * * * use in this State".

The bill then avers (and the Answer admits) that the Commissioner is construing these Acts to entitle him to collect the tax on all gasoline over 20 gallons in the fuel tanks when the bus reaches the State Line and that the imposition of the tax "would be oppressive and wrongful" for the reason that it would "restrict the freedom, convenience and safety" of interstate commerce and be "a burden" thereon.

That the bill questions the Commissioner's interpretation of the Acts is further shown by the last Section * * * thereof asking a decree (1) declaring Act 67 of 1933 "void insofar as such Act 67 purports to prohibit bringing into the State" gasoline in excess of twenty gallons, *and* (2) that insofar as Act 11 of 1934 purports to impose a tax "upon *all* gasoline in excess of twenty gallons brought into the State, * * * it is inapplicable * * *; and (3) the said tax (upon all gasoline over twenty gallons) is not properly or legally collectible under such Act from such plaintiff * * * and further (4) that *if* and insofar as the said Act 11 does or shall purport to levy or impose *such a tax*" * * * it is in conflict with the Commerce Clause.

(The numbers in parentheses are not in the bill, but the statements separated by the numbers are each connected

with the next by the conjunction "and" and "and further" as quoted.)

It has always been our contention and still is, that Act 67 of 1933 does not impose any tax but merely prohibits bringing in more than 20 gallons of gasoline upon penalty, and then provides an excuse of the penalty on condition that "the State tax" thereon is paid; and that "the State tax, the amount and to what extent it is thereon is provided elsewhere. The summation of relief asked so shows.

See Bill Secs. IV to X R. p. 6 to 10.

The answer expressly makes issue on the proper construction of the Acts by setting out the Commissioner's contention that "buses operated by the plaintiff * * * are equipped with tanks having a capacity of ninety (90) gallons, and that such tanks are filled to capacity * * * and that the amount of unused gasoline in said tanks (when the buses reach the Arkansas State line) exceeds the amount of 20 gallons and * * * (such excess) is subject to tax by the State of Arkansas" (Answer V R. p. 19).

Sections VIII and IX of the Answer must be read in connection with the contentions set forth in Section V above.

The plaintiff in the trial court said the tax was "inapplicable", "wrongful and oppressive". The defendant in the trial court said it was applicable and collectible. The issue was made and either party was at liberty to rely upon any ground to sustain its legal contentions.

Proceedings in the Trial Court

When the District Court delivered his findings of fact and law, the plaintiff in that Court (appellee here) excepted thereto, moved for additional findings and petitioned for a rehearing. These proceedings show that the following occurred:

In the petition for rehearing, the plaintiff in the trial court (appellee) called the Court's attention to the fact that the

Court in its opinion concludes "that the plaintiff is liable for the tax on *all* gasoline in excess of twenty gallons brought into the State of Arkansas in the tanks of its buses then engaged in interstate journeys, and without regard to whether the gasoline in such tanks is or is not to be used in propelling the vehicle upon the highways of Arkansas or upon the highways of Missouri or Tennessee" (R. p. 33); and

That the findings of the court are inaccurate and erroneous in the following respect:

> "(a) In Finding No. IX, the Court finds as a fact that when gasoline is not sold in the state "then the tax shall be collected when the fuel is *first brought into the stat;*' whereas, in point of fact the applicable language of Section 25 of the Act in question is 'when first brought into this state *for use therein*'. Yet the opinion of the Court holds such gasoline in excess of 20 gallons to be taxable when brought into the state, regardless of whether same is to be used therein" (R. p. 34).

Thus, there was clearly called to the trial Court's attention the fact that the plaintiff in that court (appellee) contended that the Act was improperly construed by the trial Court and that the proper construction was that the Arkansas tax was, in any event, collected only on gas brought into Arkansas "*for use therein*".

The same idea is again clearly set out in the motion of plaintiff (appellee) for additional findings II, III, and VI (R. p. 38, 39, 40).

The Court granted request No. VI for a correction of the Court's finding IX (R. p. 43) so as to make that finding read: "when not sold within the State or Arkansas, then the tax shall be collected when the fuel is brought into the State for use herein" (Amended, Order p. 43).

The corrected finding above and the refusal to make the additional findings requested was then made the basis of

assignment of error 7 before the Circuit Court of Appeals, as follows:

> "The Court erred in holding as a matter of law, that the language of Act 11 of 1934 is properly interpreted to levy (fol. 76) a tax of 6½ cents upon each gallon of gasoline, in excess of twenty gallons, which may be brought into the State of Arkansas in the tanks of buses of plaintiff in the course of an interstate journey, without regard to whether or not such gasoline in excess of twenty gallons is designed or intended for use, or is used, within the State of Arkansas; for the reason that Section 22 of said Act 11 of 1934 specifically provides that 'There is hereby levied a privilege or excise tax of six and one-half cents on each gallon of motor vehicle fuel as defined in this Act, sold or *used in this State* or purchased for sale or *use in this State*,'' and Section 25 of said Act specifically provides that 'The purpose of this Act is to provide for the payment and collection of an excise or privilege tax on the first sale of motor vehicle fuels when sold, or the use, *when used in this State*; double taxation is not intended.'" (Emphasis ours.) (R. p. 57.)

There is no contention, before the Reply Brief of Appellant just filed in this Court, that the pleadings did not cover the proper construction of the Arkansas Acts, or that the Assignment of Error No. 7 was improper. Therefore, "the shoe is on the other foot". Instead of the question not having been raised, it was raised, and the pleadings treated by all parties as covering the issue.

A party cannot for the first time in this Court take the position that the pleadings are insufficient when an inconsistent position has been taken in the trial court and in the Circuit Court of Appeals.

6 Cyc. Fed. Proc. Sec. 2973.

A prayer for an injunction against the collection of any tax certainly includes any part thereof that the Court may

find illegally demanded—the whole includes the part—especially when the part has never been demanded or assessed or acceptable.

II.

We find no objection to the authorities cited by appellant under Section B contending that the tax is collectible as to all gasoline whether for use in Tennessee, Arkansas or Missouri. Insofar as applicable, these authorities are favorable to appellee as soon to appear.

We have no contention to make with appellant in his statement that Act 67 of 1933 must be construed with Act 11 of 1934 and that neither repeals or amends the other.

We do, however, contend that the appellant's strained construction of Act 67 is wholly untenable. Perhaps this is due to counsel's losing sight of the fact that Act 67 does not tax anything. It merely prohibits bringing into the State more than 20 gallons of gasoline and then excuses the penalty provided any tax which may be levied on any or all of such gasoline by any other enactment, is paid.

Counsel refers to Act 67 as "laying the tax" (R. 11), and suggests that it "levies a tax" or lays it on all gasoline" no matter where used.

That such is a misconception of Act 67 is clear from a reading of the Act itself. Its caption shows that its purpose is "to better enforce *the gasoline tax*", not for the purpose of levying a *new* gasoline tax. Its provisions for penalty are excused if *the tax* is paid.

Counsel admits that Act 67 cannot stand alone because it does not *fix any tax*, and he therefore refers to Act 11 to find out what tax must be paid to relieve the penalty.

Again counsel falls in error by selecting one phrase from Act 11 fixing the amount of the tax without reference to what is taxed. He, in making a statutory construction, is not entitled to select one phrase and ignore the rest of the

statute. He must refer to Act 11 to see what tax has been levied, that is, the amount, the article taxed, and under what circumstances.

When Act 11 is so referred to it is immediately seen that the tax is placed only on gasoline "sold or used in this State or purchased for sale or use in this State", that is, "on all motor fuel purchased in other states *and used in this State*" • • • where such tax is not a burden on such interstate • • • commerce". That is "*the State tax thereon*" referred to in Act 67. To construe Act 67 as levying a tax would render the Act unconstitutional.

> "Every law imposing a tax shall state distinctly the object of the same."
> Art. XVI. Sec. 11.

The Arkansas Supreme Court recognized Act 11 as so limited. In *Sparling* v. *Refunding Board*, so earnestly relied upon by appellant, that Court, after characterizing the tax as "a privilege tax for the use of the highways" says:

> "The legislature has declared the public policy of the State to be to tax all gasoline *sold or used in this State for that purpose.*" The words emphasized would not have been used except to qualify the words 'all gasoline.'"

The Arkansas Court then never intimated anywhere that it was the public policy of the State to tax gasoline neither sold or used in the State. The contrary is necessarily implied.

Where the language of a statute is unambiguous, the courts will give it its plain meaning. Construction is allowed only where there is ambiguity.

Crooks v. *Harelson*, 282 U. S. 55.

Armstrong Paint & Vanish Co. v. *Nu Enamel*, 305 U. S. 315.

Appellant's reference to Act 63 of 1931 does not aid him. He does not contend that that Act is not superseded by Act 67 of 1933, nor is he claiming any tax levied under the earlier Act. The earlier Act itself shows that it was a tax levied *for use in the State* and not applicable to gasoline not used in the State. Its purpose is declared to be

> "to impose a tax upon owners" * * * "*using*" gasoline * * *" upon the public roads and highways * * * of six cents per gallon * * * used."

The highways referred to are of necessity those of the State levying the tax, and therefore the tax was intended to reach only gasoline used in Arkansas, and not that passing through. No effort was made to collect any tax from appellee under the 1931 Act. This gasoline tax statute was amended by Act 11 of 1934 and the threats of collection first made under this Act.

We agree with the cases of *Baltimore National Bank* v. *State Tax Commissioner*, and *Chamberlain* v. *State*, cited by appellant, but must strenuously differ with him on this application.

If the Act specifically exempting the manufacturer of wine from the license is not broadened or repealed by the general affirmative statute imposing a tax on each vendor of intoxicating liquor, then certainly the Act specifically exempting gasoline not bought or used in the State is not broadened or repealed by a general affirmative statute imposing a fine unless that tax is paid.

Counsel's wish is father to his very illogical thought.

Conclusion

All of the foregoing is purely in rebuttal to the contentions made in this Court for the first time and set out in

Sec. III, p. 6 to 14 of the appellant's reply brief. It is not in anywise intended as foregoing the contentions made in our first brief.

The fact that the Circuit Court of Appeals did not find it necessary to construe the Arkansas statute does not concern us. The appeal is from the action of that court, not from its reasoning; and if the result reached is correct it will not be reversed because not put upon the right ground.

Frey & Sons, Inc. v. Cudahy Packing Co., 256 U. S. 208, 41 S. Ct. 451; 5 C. J. S. (Appeal in Error) 1813.

The Circuit Court of Appeals did reach the correct conclusion and its decree should be affirmed.

Respectfully submitted,

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